Supreme Court of the United States

OCTOBER TERM 1919.
NO. 290

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR G. LANG, deceased,
Plaintiff-in-Error,
vs.
NEW YORK CENTRAL RAILROAD COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT IN-ERROR.

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Brief for Defendant in-error.

STATEMENT OF FACTS

That plaintiff's intestate's train, a way freight (Fol. 22) was eastbound, having started from Erie and being destined for Buffalo. The train came in and stopped on track No. 1 (Fol. 42).

At Silver Creek they were to take on a car which was destined for Farnham, the next station east (Fol. 43). This car for Farnham, A. L. E. & W. 12085 was on what is known as the house-track at Silver Creek, and next east was the defective car known as "A. & W. P. car 2936" (Fol. 39). The westerly end of the latter car was

defective in that the drawbar was out, which included the coupling and knuckle, (Fol. 27). This car was in good condition when it reached Silver Creek some time before, but in shifting it around the yard the drawbar had been pulled out (Fol. 36).

This defective car was loaded with iron consigned to the Huntley Manufacturing Company at Silver Creek (Fol. 40), had been moved at least on two occasions previous to the accident, and after it was in this defective condition, by plaintiff's intestate and his crew (Fols. 58, 62). The Huntley Manufacturing Company had been unable to complete the unloading of the car, and some time before the accident it had been placed on the house-track for the purpose of unloading it into the freighthouse (Fol. 41).

The New York Central car which was destined for Farnham stood just west of this defective car, but was not connected with it in any way (fol. 46) and at the time in question it was not intended that this crew should have anything to do with the defective car, nor was it necessary for them to come in contact with it in any way (Fol. 64).

The conductor talked the matter over with members of his crew, including plaintiff's intestate, and they determined that on account of this defective car they could not reach the Farnham car from the easterly end of the switch; so they determined that the proper way to get the Farnham car was to enter the houseswitch from the westerly end (Fols. 58, 59).

After this conversation between them, the engine went in on the westerly end of the house-track, plaintiff's intestate being on the engine.

They pulled out the string of six cars (including the car for Farnham), which were just west of the crippled car (Fol. 46). Lang and Chessel the two brakemen, shunted the Farnham car out onto the passing siding, so that it could be placed in the train (Fol. 46). They placed two of the other cars they had hauled out on the grape track, which is the track south of the station and is used for the loading of grapes in the grape season (Fol. 46). Then they kicked the other three cars they had hauled out back onto the house-track (Fols. 43, 44, 47), and the plaintiff's intestate rode in on these three cars (Fol. 48). The leading or most westerly car was New York Central refrigerator car No. 152485 (Fol. 40), and the brake on this car was on the easterly end of it. (Fol. 54).

It was only intended to place them so they would clear the side track (Fols. 48, 60). There was plenty of room for this, as they were placing three cars in the space which had just been occupied by six. (Fol. 60).

The last seen of plaintiff's intestate previous to the accident was by the conductor, who said he saw him mounting these three cars when they were five or six car lengths from the defective car (Fol. 49); the next time he was noticed was when the engine was moving easterly over the passing siding, and when they were at a point

opposite to New York Central car No. 152485 they saw the intestate clinging to the brake, with one of his legs hanging down and blood running from it (Fols. 52, 55). The complaint alleges (Fol. 6 that, while attempting to apply the brakes on the car, plaintiff's intestate's right foot slipped off the end of the car and that while in the act of pulling himself up his leg was caught between the running boards of the two cars.

An examination showed that the running-board of the New York Central car on which plaintiff's intestate was riding was freshly splintered about eight or ten feet back from the end. The middle running-board had been recently loosened and lifted up and there was a fresh nick in the running-board of the crippled car. It was also shown from the measurements of the car that the defective car was lower in height than the refrigerator car. On account of the lack of draw-head and couplers these two cars came together, and the running-board of the crippled car may have passed under the running-board of the refrigerator car and caught intestate's leg at a point where he would be standing when he was setting the brake (Fols. 75, 78). These cars stood about two or three feet apart after the accident (Fol. 52).

The handbrake on this freight car was in good condition (Fol. 76).

Plaintiff's intestate knew that the crippled car was there, knew that it was defective and what the defect was, it having been previously discussed by him and his crew (Fols. 58, 59). He knew its exact location, as he went in there and took the other

cars out. The movements were under his control. He did not need to have the cars kicked in. The engine was also under his control as to the speed at which the cars were shunted in, and he could have put them in there at a fast or slow rate, as the conditions warranted. He having moved this crippled car before on two occasions, knew of its condition, and could see at a glance that the draw-bars and couplers being out there was nothing to prevent the two cars coming in contact with each other, unless kept under control. It was broad daylight, and there was absolutely no reason for his not seeing and knowing what the situation was right up to the time of the accident. In fact he knew the situation perfectly before the work was commenced.

There was plenty of room on the house-track to place the cars that he was putting in so that they would not come in contact with the end of this defective car, the fact being that he had taken out six cars that were standing on this house-track west of this defective car; that out of the six, one car was to go to Farnham, and the other two were put in on the grape track to be loaded; so that he had only three cars to put back in the space where formerly six had stood. There was therefore absolutely no excuse for his placing the car upon which he was riding up against or close to the defective car, and such was not the intention (Fols. 48, 60). The other two cars he was riding down also had brakes on them, and if there was any danger of these cars colliding with the defective car, the intestate could have mounted one of

the other two cars. Or if he did not want to do any of these things he could have had the engine shunt them in at such a slow rate that there would be no trouble about stopping before they reached the defective car; or he could have had the engine push them in slowly and hold on to them until the engine itself had stopped them at a point before they reached the defective car.

He knew the situation. He knew the car was defective. He had talked with the conductor just before they started the movement and knew that the reason they had to go in on the west end instead of on the east end was due to the fact that the westerly end of the car was defective.

There was no need and it was not the intention to couple onto or move the defective car or to come in contact with it.

The conductor testifies (Fol. 64):

"Q. Was it the intention of your crew to couple onto this defective car?

A. No, Sir.

Q. Was it the intention to move or change this defective car in any way?

A. No, sir."

At (Fol. 48) he testified:

"Q. Was that your practice to put it up against the other car?

Mr. Spratt: I object to that as leading and suggestive.

Q. Is that correct?

A. No, sir, to leave it in to clear the side track, the three cars."

* * * *

"Q. What did he have to do up there?

A. Set the brake to stop them when they get into clear.

Q. By getting into clear you mean?

A. The side track."

Really the better place for him to have been was on the last car so that he could have observed when these three cars cleared the side track.

Judge Wheeler in his opinion (Fol. 93) states:

> *"It evidently was not the intention of any of the crew to disturb, couple onto or move the crippled car."*

Andrews, J., writing the opinion of the Court of Appeals said, (Fol. 110):

> *"There was no attempt to couple onto the defective car or to handle it in any way."*

POINT I.

The Judgment entered on the decision of the Court of Appeals should be affirmed and the writ of certiorari dismissed.

The Court of Appeals of the State of New York held that under all the circumstances disclosed by the record, the deceased was not one of the persons for whose benefit the safety appliance act was passed and that the collision was not the proximate result of the absence of the coupler and draw bar.

That court clearly was right in holding that this case, under the facts disclosed, was ruled by *St. Louis and San Francisco R. R. Co. vs. Conarty*, 238 U. S. 243.

Mr. Justice Andrews, in writing the opinion succinctly and correctly, (fols. 109, 110) states the distinction between the Conarty case and the Layton and Getschall cases which plaintiff-in-error claims are controlling here. This opinion, to which we refer the court, is a complete answer to the assertion that the rule as laid down by the State Court and Federal Courts is conflicting.

In the *Conarty* case an employe of a railroad not endeavoring or intending to couple a car having defective couplers, or to handle it in any way, was riding on the footboard of an engine, which collided with it, and was killed in the collision. Had the coupler and drawbar been in place the engine and body of the car would have been kept sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated. The car was about to be placed on an isolated track for repairs and had been left near the switch leading to that track while various cars were being moved out of the way—a task taking about five minutes. This court said, page 249:

> "The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with 'auto-

matic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, *nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions*, but only that had they been complied with it would not have resulted in injury to the deceased." (*Italics ours*).

and at pages 250-251:

"It is very plain that the evils against which these provisions are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling. In Johnson vs. Southern Pacific Co., 196 U. S. 1, 19, this court said of the provision for automatic couplers that 'The risk in coupling and uncoupling was the evil sought to be remedied'; and in Southern Ry: v. Crockett, 234 U. S. 725, 737, it was said to be the plain purpose of the two provisions that 'where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard.' *Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between col-*

liding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars. 27 Stat. 531.'

We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise." (Italics ours).

The facts in the *Conarty* case are almost, if not precisely the same as the facts in the Lang case, except, if anything, this case is more favorable to the defendant. There, as here, the intestate and the railroad were engaged in interstate commerce. In both cases there was no intention to couple on to the car or handle it in any way. Conarty was riding on the footboard of the colliding engine. Lang was riding on the cars which collided with the defective car. In the *Conarty* case the defective car was, in about five minutes time, to be placed on an isolated track for repairs, but while awaiting that movement had been left near the switch leading to that track in order that other cars might be moved out of the way. Here the defective car was standing on a house track await-

ing unloading, and there was no purpose or intention of disturbing it at all. The car in that case was just as much in use by the railroad as was the car involved here. In *Conarty* case the accident happened at night, and the intestate knew nothing of the condition of the car or its location. Here the intestate knew all about the location of the car, its defective condition and it was his purpose to stop the cars upon which he was riding before they came in contact with the defective car. The work was being done as it was for the express purpose of avoiding contact with or the use of the defective car. There, as here, the presence of the coupler and drawbar might have kept the cars apart and possibly the injury would not have resulted. In both cases the collision was the proximate cause of the injury.

Plaintiff-in-error in an effort to distinguish the Conarty case from the present one, makes certain statement in her brief which we respectfully submit are not in accord with the facts as stated by this court in its opinion in the *Conarty* case.

The statement is made on page 14:

> "For in that case the out of order car was standing on an isolated switch waiting for repairs; out of commission, and out of use by the defendant."

and at page 22:

> "The car in that case, also, was out of use."

The court in its opinion, page 248, says:

> "The car was *about* to be placed on an iso-

lated track for repairs, and was left near the switch leading to that track while other cars were being moved out of the way,—a task taking about five minutes." (Italics ours).

We submit that the defective car in the Conarty case was *in* use by the railroad. It had been dropped for a period of only five minutes to enable the crew to make a place for it on the isolated repair track, and as soon as this was done it was the intention to move it to that track. Here the entire crew, including intestate, were studiously avoiding the use, in any way, of the defective car, and it was not their intention to move it or come in contact with it.

The trial court and the Court of Appeals, both having distinctly held that there was no intention to disturb, couple onto or in any way handle the defective car, we submit that this fact has been conclusively established against the plaintiff-in-error, and as we understand the rule the concurrent judgment of the lower courts will be accepted by this court.

Boehmer v. Pennsylvania R. Co., 252 U. S. 496.

Unless this court has, by its later decisions, disapproved the *Conarty* case, that decision must be applied to the case at bar, in fact there is greater reason for applying those principles here than there was in the text case.

Distinguishing cases cited by plaintiff-in-error.

In the *Layton case* 243 U. S. 617 the plaintiff

was a switchman and was engaged under the following circumstances:

> "A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and failed in an attempt to couple to the five cars but struck them with such force, that although the engine with the car attached stopped within half a car length, the five loaded cars were driven over the two intervening cars lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing brakes, was thrown to the track." (page 618-619).

There a defective coupler prevented the engine from coupling to the five cars as intended and the violation of the act was clearly the proximate cause of the injury.

In the *Gotschall* case, 244 U. S. 66, the train upon which Gotschall was riding separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brake, which threw Gotschall off the train and under the wheels. The defective coupler was the proximate cause of the injury. The Safety Appliance Act was also applicable in the *Gotschall* case under the rule laid down by this court in the *Conarty* case, where the court said that one of the evils against which the provisions were directed was:

"where the cars when coupled into a train sometimes separate by reason of the insecurity of the coupling."

There is not the slightest evidence in this case from which it can be claimed that the collision was proximately attributable to a violation of the Safety Appliance Acts. Here, as in the Conarty case, the most that can be urged is, that, had the acts been complied with, the injury to intestate would have been avoided. The defective coupler here did not contribute any more to the injury to intestate than did the defective coupler involved in the *Conarty* case. For this reason the authorities cited by petitioner, as bearing out the contention that if the defective coupler contributed in whole or in part to the injury, that is sufficient to establish liability under the Safety Appliance Act, are inapplicable. In fact, in all of the cases cited, the violation of the Act clearly was the proximate cause of the injury.

In the *Huxell* case, 245 U. S., 535, there was a defective condition of the power brake. With proper brakes the engine could have been stopped within 40 feet. It ran more than 135 feet. The question was whether the deceased, who survived the accident for fifteen hours did not receive injuries which contributed to his death, during the time the engine was negligently run for 100 feet at least.

In the *Wagner* case, 241 U. S., 476, a brakeman, employed in interstate commerce, was endeavor-

ing to make a coupling between an engine and car. The coupling did not make on the first impact. On the next attempt he noticed that the drawhead on the engine was out of position and put his left foot in to shift it over so that the coupling would make. His right foot slipped on the footboard and his left foot was caught between the drawheads and crushed.

In the *Parker* case, 242 U. S., 56, there was no dispute but that the case was governed by the Safety Appliance Act. Parker was engaged in coupling a tender to a car. The coupling did not make the first time and Parker, noticing the drawheads were not in line, put in his arm to straighten them and was caught.

In the *Otos* case, 239 U. S., 349, the coupler was out of order, *the pin-lifter was missing*, and other repairs were needed. The car had been marked for repairs and was being switched to the repair track. Plaintiff being unable to uncouple the disabled car from the side where the pin-lifter was missing without going between the cars, did so while the cars were moving and was hurt.

In the *Rigsby* case, 241 U. S., 33, plaintiff fell owing to a defect in one of the handholds or grabirons that form the rungs of a ladder while he was descending the ladder.

In the *Delk* case, 220 U. S., 580, a loaded car being used in moving interstate commerce was found with a defective coupler. The car was marked "In bad order" and a repair piece sent for. The car was not withdrawn from service, but the company kept moving it about in connec-

tion with other cars, and finally ordered the plaintiff to couple it to another car. The chain connecting the uncoupling lever to the lock-pin or lock-block, was disconnected, owing to a break in the lock-pin or lock-block. The drawbar had also a lateral motion of four inches. Plaintiff undertook to hold the drawbar away with his foot, from the side which he stood, so that the two couplers would couple by impact. In doing so his foot was injured.

In the *Lindsay* case, 233 U. S., 42, the couplings failed several times to couple automatically. Plaintiff went between the cars for the purpose of ascertaining and remedying if possible the cause of the trouble. Before doing so he signaled the engineer to stand fast. While he was between the cars, and engaged in handling the couplers the cars were pushed together and his arm was crushed

In New York Central R. R. Co. vs. Kimball, 248 U. S., 572, the employee went in between cars to adjust a chain used to attach a car with a defective coupler to another car.

In the *Spokane, etc.* case, 217 Fed. 518, the Safety Appliance Act was not involved.

In the *Ronald* case, 265 Fed. 143, the injury was caused by a grabiron giving way.

In the *Schleenbacker* case, 257 Fed., 667, the company was hauling a car without drawbar or coupler, contrary to the express provisions of the act. This necessitated attaching it to the rear of the caboose, as a result of which the lights from the rear of the caboose had to be removed to the

rear end of the defective car. The whole situation was created solely because of the use of the defective car.

An examination of plaintiff's brief will satisfy this court, we believe, that plaintiff's quarrel is entirely with the decision of this court in the Conarty case and that the real contention is that this court has by later decisions overruled the Conarty case.

The Court of Appeals merely held that under the facts disclosed this case was ruled by the Conarty case. It did not hold that the Safety Appliance Act had no application, unless the employee was engaged in coupling or uncoupling, or going between cars for that purpose, as urged on pages 19 and 22 of plaintiff's brief. On the contrary the court below, recognizing the rule laid down by this court in the Layton and Gotschall cases, said:

> "If, however, a collision was proximately caused by the failure of the railroad to obey the statute, it was not intended to hold that only those servants actually engaged in coupling or uncoupling cars could recover for the resulting injuries. Any servant so injured equally comes within the protection of the statute. (Louisville & Nashville Railroad Company v. Layton, 243 U. S., 617; Minn. & St. Louis R. R. Co. v Gotschall, 244 U. S. 66)."

The Court of Appeals of the State of New York did not lay down any rule which in any way conflicts with the decisions of this court, as claimed

by the plaintiff. On the contrary, the opinion indicates that in arriving at its conclusions the Court of Appeals was governed entirely by the decisions of this Honorable Court.

The proximate cause of the accident was the failure of the deceased to stop the cars before they came into collision with the defective car. The absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause. This was made clear by this court's decision in the Conarty case, where it was said:

> "It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of these provisions, but only that had they been complied with it would not have resulted in injury to the deceased."

A most careful analysis of the facts in this case fail to distinguish it from the Conarty case. Unless this Honorable Court has already overruled, or intends to overrule the Conarty decision, none of the errors claimed to have been committed by the said Court of Appeals exist.

FINALLY

We respectfully submit that the judgment entered upon the decision of the Court of Appeals of the State of New York should be affirmed and the writ of certiorari dismissed.

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SUPREME COURT OF THE UNITED STATES.

No. 290.—October Term, 1920.

Anna Lang, as Administratrix, &c., of Oscar G. Lang, Deceased, Petitioner, vs. New York Central Railroad Company.	On Writ of Certiorari to the Supreme Court of the State of New York.

[March 28, 1921].

Mr. Justice McKenna delivered the opinion of the Court.

Action for damages laid in the sum of $50,000 for injuries sustained by petitioner's intestate, Oscar G. Lang, while assisting in switching cars at Silver Creek, N. Y. The injuries resulted in death. The Safety Appliance Act is invoked as the law of recovery.

There was a verdict for $18,000 upon which judgment was entered. It and the order denying a new trial were affirmed by the Appellate Division, March 5, 1918, by a divided court.

The Court of Appeals reversed the judgments and directed the complaint to be dismissed, to review which action this certiorari is directed.

In general description the court said: "In the case before us the defendant [Respondent] was engaged in interstate commerce. A car without a drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman and was riding on a second car kicked upon the same siding. A collision occurred and the deceased was crushed between the car upon which he was riding and the defective car."

There is no dispute about the facts; there is dispute about the conclusions from them. We may quote, therefore, the statement of the trial court, passing upon the motion for new trial, as sufficient in its representation of the case. It is as follows: "The defendant had a loaded car loaded with iron which had been placed on a siding at the station at Silver Creek, New York. On